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No. 07-562

IN THE
Supreme Court of the United States

ALTRIA GROUP, INC., AND PHILIP MORRIS USA INC.,
PETITIONERS,
V.
STEPHANIE GOOD, ET AL.,
RESPONDENTS.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

BRIEF *AMICUS CURIAE* OF PRODUCT LIABILITY ADVISORY COUNCIL, INC., IN SUPPORT OF PETITIONERS

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This brief is filed on behalf of the Product Liability Advisory Counsel ("PLAC") as *amicus curiae* in support of Petitioner, with the consent of the parties.[1]

STATEMENT OF INTEREST

PLAC is a nonprofit association with more than 120 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective derives from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Several hundred of the leading product liability defense attorneys in the country are also sustaining (nonvoting) members of PLAC. Since 1983, PLAC has filed more than 800 briefs as amicus curiae in both state and federal courts, including at least 69 briefs in this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. The corporate members of PLAC are listed in the Appendix.

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[1] Blanket letters of consent from the parties have been filed with the Clerk. Pursuant to Rule 37.6, PLAC states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* and its members (through regular dues payments) made a monetary contribution to this brief.

PLAC is well situated to address the issues in this case because its members often have confronted the interplay between the duties imposed by federal regulatory authorities and the standards applied in product liability cases and cases alleging statutory consumer fraud. Further, many PLAC members belong to heavily-regulated industries, and PLAC has a compelling interest in ensuring that express preemption provisions are interpreted in a way that does not frustrate the purposes of federal regulations and subject its members to conflicting requirements set by individual juries applying the laws of 50 states.

STATEMENT OF THE CASE

PLAC joins in the statement of the case provided by the Petitioners (referred to as Defendants in the remainder of this brief). For purposes of this brief, however, it will be helpful to provide additional details concerning the Maine Unfair Trade Practices Act, Me. Rev. Stat. tit. 5, §205-A et seq., ("MUTPA"), and Plaintiffs' Complaint, which purports to assert a claim under MUTPA. The First Circuit recognized that some claims relating to smoking and health brought under MUTPA would be preempted, but it held that the claim brought in this case is not. As PLAC will demonstrate, the distinctions drawn by the First Circuit, based on the plurality opinion in *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504 (1992), are arbitrary and cannot reflect the intent of Congress as expressed in 15 U.S.C. §1334(b)(hereinafter "§1334(b)").

1. Under §207 of MUTPA, "deceptive acts or practices in the conduct of any trade or commerce are declared unlawful." Me. Rev. Stat. tit. 5 §207. The statute itself does not define "deceptive act," but the Supreme Judicial Court of Maine has defined it to mean "a material representation, omission, act or practice that is likely to mislead consumers acting reasonably under the circumstances." *State v. Weinschenk*, 2005 ME 28, 868 A.2d 200, 206 (2005).

The statute permits the state Attorney General to "make rules and regulations interpreting" §207. Me. Rev. Stat. Ann. tit. 5 §207(2). Under §209 of MUTPA, the Attorney General may also bring an action to restrain by injunction the use of any deceptive act or practice and to seek restitution on behalf of any person who has suffered an ascertainable loss as a result of such an act or practice. Me. Rev. Stat. Ann. tit. 5 §209. Under §213, a private person who purchases or leases goods and who suffers loss of money or property as the result of a deceptive practice may also enforce the statute by bringing an action to recover actual damages or restitution. Me. Rev. Stat. Ann. tit. 5 §213.

2. This is a putative class action brought by private persons seeking billions of dollars under §213 of MUTPA. According to the Complaint, Defendants engaged in "deceptive" practices "to induce cigarette smokers to continue smoking *in spite of growing public awareness of a connection between cigarette smoking and serious health problems.*" (JA 8a, ¶ 2 [emphasis added].) Defendants allegedly sought to "reduce [smokers'] concerns about the negative health implications of smoking" by "introduc[ing] Marlboro Lights and Cambridge Lights into the

market" and selling them "as having decreased tar and nicotine." (JA 11a, ¶¶ 18, 19.)

The Complaint acknowledges that the design of these cigarettes did "provide for a lower measurement of tar and nicotine" as compared to standard cigarettes in "standardized testing by the Federal Trade Commission apparatus." (JA 12a, ¶ 23.) Nevertheless, according to the Complaint, consumers would compensate for the lower tar and nicotine levels in various ways, with the result that Marlboro Lights and Cambridge Lights "did not reduce the delivery of tar or nicotine to the consumer." (JA 13a, ¶ 29.) Plaintiffs allege that Defendants violated MUTPA "through one or more of the following deceptive acts and practices," including "[f]alsely and/or misleadingly represent[ing] that their product is 'light' and/or delivers 'lowered tar and nicotine' in comparison to regular cigarettes." (JA 19a-20a, ¶¶ 54, 54(a).)

3. The trial court in this case held that this claim under MUTPA was preempted by the Federal Cigarette Labeling and Advertising Act ("Labeling Act"), which provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Chapter." 15 U.S.C. §1334(b). The First Circuit reversed. *Good v. Altria Group, Inc.,* 501 F.3d 29 (1st Cir. 2007).

Attempting to apply the plurality opinion in *Cipollone*, the First Circuit recognized that Plaintiffs' MUTPA claim would be preempted if it explic-

itly alleged that it was deceptive to describe the cigarettes as "light" or as having "lower tar and nicotine" without a warning or disclosure concerning smoker compensation. *Id.* at 42. The First Circuit also recognized that Plaintiffs' MUTPA claim would be preempted if Plaintiffs were claiming that it was deceptive to describe the cigarettes as "light" or as having "lower tar and nicotine" because those words suggested the cigarettes "did not pose the same grave threats to health announced in the accompanying [federally-mandated] warning label." *Id.* at 43-44.

Nevertheless, the First Circuit held that Plaintiffs' MUTPA claim in this case was not preempted because Plaintiffs were not making either a "failure to warn" claim or a "warning neutralization" claim. Instead, as the First Circuit viewed it, Plaintiffs were simply alleging that Defendants made statements in their advertising that were false. Such claims were not preempted under the plurality opinion in *Cipollone*, the First Circuit opined, because they are not "based on smoking and health" but on "'a more general obligation—the duty not to deceive.'" 501 F.3d at 42, quoting *Cipollone,* 505 U.S. at 528-29.

SUMMARY OF ARGUMENT

If it were not for confusion caused by the plurality opinion in *Cipollone,* the analysis of the express preemption issue in this case would be straightforward and the result of that analysis plain.

Under 15 U.S.C. §1334(b), claims are preempted if they impose "requirement[s] or prohibition[s]," if

those requirements or prohibitions are "with respect to the advertising or promotion of any cigarettes" the packages of which are properly labeled, and if those requirements or prohibitions are "based on smoking and health." 15 U.S.C. §1334(b). Through the mechanism of a liability award, Plaintiffs in this case seek to impose "requirements or prohibitions" on Defendants' "advertising or promotion" of cigarettes. *See, e.g., Riegel v. Medtronic, Inc.*, 552 U.S. ___, 128 S.Ct. 999, 1008 (2008)(liability awards generally constitute "requirements" for purposes of express preemption provisions). The requirements or prohibitions that Plaintiffs seek to impose are "based on smoking and health" because they are "intertwined with" and "motivated by" concerns about the effects of smoking on health. *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 548 (2001). Therefore, Plaintiffs' claims are expressly preempted, a result consistent with Congressional intent as expressed in the plain language of the statute.

In contrast, the plurality opinion in *Cipollone*, as evidenced by the First Circuit and other decisions, requires a convoluted analysis that is completely untethered to the language of the statute. Not surprisingly, that analysis leaves the application of Congress's preemption provision to each court's subjective characterization of the plaintiffs' claims and yields results that cannot have been intended by Congress. The plurality opinion in *Cipollone* is not binding on this Court, it is inconsistent with this Court's decision in *Reilly*, and it should be expressly rejected in this case.

ARGUMENT

I.

PLAINTIFFS' MUTPA CLAIM IS EXPRESSLY PREEMPTED BECAUSE IT WOULD IMPOSE A REQUIREMENT WITH RESPECT TO PROMOTION AND ADVERTISING BASED ON SMOKING AND HEALTH

1. With respect to cigarettes labeled in conformity with the Labeling Act, states may not impose any "requirement or prohibition" with respect to "advertising or promotion" that is "based on smoking and health." §1334(b). But for the plurality decision in *Cippolone,* there could be no question that all of these statutory requirements for preemption are met in this case.

First, there is no claim that the cigarettes at issue were not labeled as required by the Labeling Act. Second, Plaintiffs are seeking to obtain a liability award against Defendants for their conduct with respect to the "advertising and promotion" of those cigarettes. Third, a liability award is a "requirement or prohibition" for purposes of express preemption clauses because it "can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Riegel*, 128 S.Ct. at 1008 (internal quotation marks omitted), quoting *Cipollone,* 505 U.S. at 521. Finally, the requirements or prohibitions that Plaintiffs seek to impose on Defendants' advertising and promotion through a liability award are "based on smoking and health" because they are "intertwined with" and "motivated by concerns about smoking and health." *Reilly,* 533 U.S. at 548.

2. But for the confusion created by the plurality opinion in *Cipollone,* it would be obvious that this Court's decision in *Reilly* is controlling on the latter point—the only one at issue in this case. Like MUTPA, the statute at issue in *Reilly* declared "deceptive acts and practices" to be unlawful and authorized enforcement both by the state Attorney General and by private persons injured by deceptive acts or practices. In fact, the relevant provisions of the Massachusetts statute in *Reilly* are identical in substance to the relevant provisions of the Maine statute. *Compare* Mass. Gen. Laws, ch. 93A, §§2, 4 and 9 *with* Me. Rev. Stat. Ann. tit. 5 §§207, 209 and 213. In *Reilly*, the state Attorney General acting under the Massachusetts statute sought to impose requirements or prohibitions on the promotion and advertising of cigarettes; Plaintiffs in this case—private persons acting under the Maine version of the same statute—also seek to impose requirements or prohibitions on the promotion and advertising of cigarettes.

Moreover, the Attorney General in *Reilly,* like Plaintiffs in this case, argued that the requirements or prohibitions imposed under the statute were not preempted because they were not "based on smoking and health" but were instead based on the broader, more general duties created by the statute:

> The plurality [in *Cipollone*] stated that laws based on a "general duty"—such as the duty not to deceive—are not "based on smoking and health" within the meaning of §[1334(b)]. [505 U.S.] at 528-529 (holding fraud claim not preempted). Similarly, the locational restrictions in the Massachusetts regulations, which are based on the general

> proscription on unfair practices under the Massachusetts Consumer Protection Act, Mass. Gen. Laws. ch. 93A, §2(a), are not "based on smoking and health" as that phrase in §[1334(b)] was construed in *Cipollone.*

Brief of Respondent Thomas F. Reilly, Attorney General of Massachusetts, at 25, *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525 (2001) (Nos. 00-596, 00-597), 2001 WL 303038, at *25 (U.S. March 26, 2001).

This Court in *Reilly* rejected this argument, finding that the "context in which Congress crafted the current pre-emption provision leads us to conclude that Congress prohibited state cigarette advertising regulations motivated by concerns about smoking and health." 533 U.S. at 548. This Court recognized that there is a "critical distinction . . . between generally applicable zoning regulations and regulations targeting cigarette advertising." *Id.* at 549-550 (citation omitted). "The latter type of regulation, which is inevitably motivated by concerns about smoking and health, squarely contradicts the [Labeling Act]." *Id.*

Absent the plurality opinion in *Cipollone,* there would be no basis for distinguishing the facts and circumstances of this case from those in *Reilly.* Both this case and *Reilly* involve requirements or prohibitions that "target [] cigarette advertising," that are "intertwined with the concern about cigarette smoking and health," and that are "motivated by concerns about smoking and health." *Reilly,* 552 U.S. at 548, 550. In *Reilly,* the state Attorney General sought to impose the requirements through regulations, while in this case private persons seek to impose the

requirements through a liability award. But just this term this Court reaffirmed the *Cipollone* majority's conclusion that both regulations and liability awards constitute "requirements" within the meaning of a preemption provision like the one involved in this case. *Riegel*, 128 S.Ct. at 1008.

3. This Court in *Riegel* pointed out why it is unlikely that Congress would intend to grant greater power to single state juries to set state standards that differ from or supplement federal standards than it did to state officials. 128 S.Ct. at 1008. State officials, unlike lay jurors, can at least be expected to apply standards similar to those that would be applied by the responsible federal agency. *Id.* As this Court observed in *Riegel,* for example, a state agency adopting a medical device regulation, unlike a jury, "could at least be expected to apply cost-benefit analysis similar to that applied by the experts at the FDA." *Id.*

The same analysis applies with equal force here. MUTPA, like the Massachusetts statute in *Reilly,* expressly requires that regulations adopted by the state Attorney General be consistent with the rules, regulations, and decisions of the Federal Trade Commission. Me. Rev. Stat. tit. 5, §207(2); Mass. Gen. Laws. Ch. 93A, §2(c). Thus, state Attorneys General, like the FTC, might at least be expected to regulate with the purposes of the Labeling Act in mind. These purposes include (1) adequately informing the public of the hazards of smoking, (2) protecting "commerce and the national economy," and (3) avoiding "diverse, nonuniform, and confusing cigarette labeling and advertising regulations." 15 U.S.C. §1331.

But while a state attorney general might regulate with *all* of these purposes in mind, a jury deciding Plaintiffs' MUTPA claim would likely hear ample evidence relating to the hazards of smoking but virtually nothing about the potential adverse effects that its decision (and decisions of other juries) could have on commerce or the national economy, or about the importance of avoiding diverse and nonuniform cigarette labeling requirements. *See Riegel,* 128 S.Ct. at 1008 (a jury "sees only the cost of a more dangerous design, and is not concerned with its benefits"); *cf. Cipollone v. Liggett Group, Inc.*, 644 F.Supp. 283 (D.N.J. 1986)(benefits to national economy of producing and marketing cigarettes held irrelevant to the strict liability risk/utility analysis). Thus, the risk of disrupting federal policy is far greater with liability awards than with regulations adopted by state regulators.

Because of concerns like these, this Court in *Riegel* refused to "turn somersaults" to create a "perverse" distinction for purposes of federal preemption that would permit juries but not state regulators to impose requirements in addition to those imposed by federal law. 128 S.Ct. at 1008 . A distinction between this case and *Reilly* would be equally perverse and—but for the plurality decision in *Cipollone*—there would be no reason to even consider creating one.

II.

THE PLURALITY DECISION IN *CIPOLLONE* WAS WRONG TO THE EXTENT THAT IT HELD THAT SOME OF THE FRAUD CLAIMS WERE NOT PREEMPTED.

The analysis set forth above is consistent with the plain language of §1334(b); with the decisions of this Court, including *Reilly* and *Riegel;* and with common sense. The plurality's opinion in *Cipollone* is not consistent with any of these, particularly as that opinion was interpreted and applied by the First Circuit in this case. Defendants' brief demonstrates why the claims in this case would be preempted even if the plurality opinion in *Cipollone* were correct, but experience—and this very case—show that the plurality's vague and strained interpretation of the "based on smoking and health" language of §1334(b) leads to arbitrary results that find no support in the language of the statute and that cannot accurately reflect the intention of Congress.

1. The *Cipollone* plurality concluded that two tort claims asserted against the defendant tobacco manufacturers were preempted, but one was not. First, the plurality found that the plaintiffs' "failure-to-warn" claim was preempted insofar as it required a showing that the defendants should have included additional or more clearly stated warnings in its advertising or promotions. 505 U.S. at 524. Second, the plurality found that the plaintiffs' fraudulent misrepresentation theory was preempted to the extent that plaintiffs alleged that the defendants, "through their advertising, neutralized the effect of

federally mandated warnings." *Id.* at 527-28. According to the plurality, this claim was preempted because it was "inextricably related" to the preempted failure-to-warn claim and because it was "predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking." *Id* at 528. Finally, the plurality found that plaintiffs' fraudulent misrepresentation claim was *not* preempted to the extent it was based on "allegedly false statements of material fact made in advertising." According to the plurality, this claim, unlike the others, escaped preemption because it was "predicated not on a duty 'based on smoking and health' but rather on a more general obligation—the duty not to deceive." *Id.* at 528-29.

2. As both Justices Blackmun and Scalia pointed out at the time (*id.* at 542-43, 552-53), there is a fundamental problem with this analysis: if the claim based on "false statements of material fact in advertising" was not "based on smoking and health" because it was based on a more general obligation, the same is true for the failure-to-warn claim. Under state law, the obligation to warn arises from generally-applicable principles of strict liability and negligence under which all product manufacturers are obligated to give those warnings of foreseeable risks that are necessary to make the product reasonably safe. *See generally* Restatement (Third) of Torts: Products Liability § 2(c), comments i-l (1998).

Moreover, *both* of the fraudulent misrepresentation claims made in *Cipollone* were based on New Jersey's common law of fraud. To be actionable as "actual legal fraud" under New Jersey law, any

representation made in the defendants' advertising would have to be a "material representation of a presently existing or past fact, made with knowledge of its falsity." *Jewish Center of Sussex County v. Whale*, 86 N.J. 619, 624, 432 A.2d 521, 524 (1981); *accord, e.g., Banco Popular North America v. Gandi,* 184 N.J. 161, 173, 876 A.2d 253, 260 (2005). Further, under the common law of fraud, recovery may be awarded both for a representation that is actually false and for a representation that "is truthful so far as it goes but which is materially misleading." *Medivox Productions, Inc. v. Hoffmann-LaRoche, Inc.,* 107 N.J. Super. 47, 69, 256 A.2d 803, 815 (1969); *see generally* Restatement (Second) of Torts §529, comment a (1977) ("[A] statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all the facts stated were untrue.").

Thus, plaintiffs' claims in *Cipollone* were necessarily based on the general duty "not to deceive," regardless of whether they were claiming that the advertising was false or that it was misleading because of its tendency to "neutralize" the federally mandated warnings. There was no basis at all for the plurality's conclusion that one of these claims was based on the general "duty not to deceive" imposed by the common law of fraud, but that the other claim was not.

3. The First Circuit's opinion in this case illustrates the flaw in the plurality's analysis even more starkly. Consistent with the plurality's decision in *Cipollone,* the First Circuit recognized that §1334(b) would preempt a MUTPA claim alleging that Defendants committed a deceptive act or practice by

failing to warn of the dangers of smoking—*i.e.*, by failing to provide additional or more clearly stated warnings in its advertising. *Good*, 501 F.3d at 42. Equally consistent with the plurality decision in *Cipollone,* the First Circuit also recognized that §1334(b) would preempt a MUTPA claim alleging that Defendants committed a deceptive act or practice by making representations that "neutralized" the required government warnings, *i.e.*, that suggested that the cigarettes at issue "do not pose the same grave threats to health announced in the accompanying warning." *Id.* at 44. *But both of these theories would be based on the same "duty not to deceive" created by §207 of MUTPA, just like the "false representation" theory that the First Circuit held was not preempted.*

Thus, the decision in this case makes it abundantly clear that the distinction drawn by the *Cipollone* plurality between preempted claims and non-preempted claims cannot in reality depend on whether the claim is based on a "general duty" like the "duty not to deceive." Rather, as the First Circuit tellingly observed, it depends simply on "how best to categorize them by analogy to the various causes of action considered in *Cipollone." Good,* 501 F.3d at 36. The hundreds of pages that other courts have devoted to convoluted attempts to determine which of the claims in *Cipollone* most closely resembles the claims being asserted amply confirms that the analysis in these cases has become increasingly divorced from the language of §1334(b)—and from the intent of Congress. *See, e.g., Brown v. Brown & Williamson Tobacco Corp.,* 479 F.3d 383, 393-94 (5th Cir. 2007); *Good,* 501 F.3d at 36-40; *In re Tobacco Cases II,*

41 Cal. 4th 1257, 1271-72, 63 Cal.Rptr.3d 418, 429, 163 P.3d 106, 115 (2007); *Est. of Schwarz v. Philip Morris Inc.*, 206 Or. App. 20, 36, 135 P.3d 409, 421 (2006) (en banc); *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1202 (11th Cir. 2004); *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 439-40 (Tex. 1997); *Cantley v. Lorillard Tobacco Co.*, 681 So. 2d 1057, 1061 (Ala. 1996); Beverly L. Jacklin, Annotation, *Federal Pre-emption of State Common-Law Products Liability Claims Pertaining to Tobacco Products*, 97 A.L.R. Fed. 890 (1990 & 2008 Supp.)(compiling the many confusing and conflicting decisions attempting to apply the *Cipollone* plurality's analysis).

4. In fact, as the First Circuit interpreted the plurality decision, whether a claim is preempted depends simply on the label that the court decides should be attached to the claim: if Plaintiffs have alleged a "fraudulent misrepresentation claim," it is not preempted, but if Plaintiffs "have in reality alleged failure-to-warn or warning neutralization claims, the claims are preempted." *Good,* 501 F.3d at 37. But this case also illustrates starkly the arbitrariness by which such labels can be assigned, providing further evidence that the results cannot be what Congress intended.

First, Plaintiffs allege that describing the cigarettes at issue as "light" is "deceptive and misleading" *because* the cigarettes registered "lower tar and nicotine levels under machine testing conditions while actually delivering higher levels of these compounds when smoked by consumers." (JA 20a, ¶ 54(b).) According to the First Circuit, this is not a preempted "failure to warn" claim. *See Good,* 501 F.3d at 42. But a claim phrased just slightly differ-

ently—alleging, for example, that it is deceptive and misleading to describe cigarettes as "light" *without disclosing* the basis for the description —would be a preempted "failure to warn" claim. *Id.*

Alleging that the descriptor is deceptive because consumers do not know the basis for it is substantially identical to alleging that the descriptor is deceptive unless consumers are told the basis for it. Assuming that some subtle but significant difference exists between the two claims, it would be impossible to maintain that distinction during the course of a trial, even if the plaintiffs were incredibly careful in the questions they asked and the arguments they made. More importantly, nothing in the language of §1334(b) even remotely suggests these two claims should be treated differently. In fact, any difference between the two claims is so minuscule that Congress almost certainly did not intend to permit one while completely disallowing the other, particularly since the disallowed claim could be saved with only a minor, largely non-substantive change of words.

5. Further, the allegations in this case establish that Plaintiffs are in fact making a "warnings neutralization" claim that is only thinly disguised (if it is disguised at all). Plaintiffs specifically allege that the Defendants' deceptive practices were designed to "induce cigarette smokers to continue smoking in spite of the growing public awareness of a connection between cigarette smoking and serious health problems," and that Defendants' intention was to "provide smokers who were concerned about their health with a product that could reduce their concerns about the negative health implications of smoking." (JA 8a, 11a, ¶¶ 2, 18.) Of course, the "growing

public awareness" of health problems and the "concern" of smokers were necessarily based on the various warnings from various sources that were available to the public concerning the dangers of smoking. Thus, the Complaint all but expressly alleges that Defendants, by advertising and promoting cigarettes as "light," were attempting to neutralize the impact of all of the warnings that were available to consumers, *including but not limited to the federally mandated warning labels.*

Accordingly, the difference between the preempted claim made in *Cipollone* and the claim made in this case—if any difference actually exists—is simply that the plaintiff in *Cipollone* claimed that the defendants attempted to neutralize *only* the federally mandated warnings, while Plaintiffs in this case claim that Defendants attempted to neutralize *all* of the available warnings, including the federally mandated warnings. Nothing in the language of §1334(b) suggests that Congress intended to allow the former claim and disallow the latter.

6. In short, the straightforward analysis required by §1334(b) as interpreted by this Court in *Reilly* produces logical results consistent with the purposes of the Labeling Act and with the apparent intent of Congress. The convoluted analysis required by the plurality opinion in *Cipollone,* particularly as that opinion was interpreted by the First Circuit in this case, leads to arbitrary results that could not have been intended by Congress. Under either analysis, the claims alleged in this case are preempted, but this Court should take this opportunity to eliminate a source of uncertainty and confu-

sion that will otherwise continue to confuse the lower courts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Dated: April 7, 2008

APPENDIX

Corporate Members of the Product Liability Advisory Council

as of 3/6/2008

3M
Altec Industries
Altria Corporate Services, Inc.
American Suzuki Motor Corporation
Andersen Corporation
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
BASF Corporation
Bayer Corporation
Bell Sports
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Briggs & Stratton Corporation
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chrysler LLC
Continental Tire North America, Inc.
Cooper Tire and Rubber Company

Coors Brewing Company
Crown Equipment Corporation
Daimler Trucks North America LLC
The Dow Chemical Company
E.I. DuPont De Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Genentech, Inc.
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
The Heil Company
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Komatsu America Corp.

Kraft Foods North America, Inc.
Leviton Manufacturing Co., Inc.
Lincoln Electric Company
Magna International Inc.
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Mueller Water Products
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Nokia Inc.
Novartis Consumer Health, Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc.
Panasonic
Pfizer Inc.
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Putsch GmbH & Co. KG
The Raymond Corporation
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Sanofi-Aventis
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company

Smith & Nephew, Inc.
St. Jude Medical, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.
TK Holdings Inc.
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive
UST (U.S. Tobacco)
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.